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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 LUIS ARMANDO HERNANDEZ,) No. CV 16-2748 SVW (FFM)
12)
13 Petitioner,) **ORDER TO SHOW CAUSE WHY**
14 v.) **THE PETITION SHOULD NOT BE**
15) **DISMISSED AS UNTIMELY**
16 JEFFERY A. BEARD, CDCR DIR.,)
17)
18 Respondent.)
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18 On April 14, 2016, Petitioner Luis Armando Hernandez, Jr. (“Petitioner”), a
19 California prisoner proceeding *pro se*, constructively¹ filed a Petition for Writ of Habeas
20 Corpus by a Person in State Custody (“Petition”), pursuant to 28 U.S.C. § 2254. (Dkt.
21 No. 1). The Petition challenges Petitioner’s 1993 sentence for assault with a deadly
22 weapon, attempted murder, and accompanying street-gang sentencing enhancements.

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26 ¹ A pro se petitioner’s relevant filings may be construed as filed on the date they
27 were submitted to prison authorities for mailing, under the prison “mailbox rule” of
28 *Houston v. Lack*, 487 U.S. 266 (1988). Although the Petition contains neither a proof of
service nor a date of execution, the envelope containing the Petition bears a small
notation dated April 14, 2016.

1 **1. LIMITATIONS PERIOD FOR FEDERAL HABEAS PETITIONS**

2 The present proceedings were initiated after the April 24, 1996, effective date of
3 the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Accordingly, the
4 AEDPA’s timeliness provisions apply, including a one-year limitations period which is
5 subject to both statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1); *see also*
6 *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001) (citations omitted). For those
7 prisoners whose convictions became final before AEDPA’s effective date, the one-year
8 period began running on April 25, 1996. *Malcom v. Payne*, 281 F.3d 951, 955 (9th Cir.
9 2002). Accordingly, “unless a subsection of Section 2244(d) calls for a later initiation of
10 the limitations period,” *Hasan v. Galaza*, 254 F.3d 1150, 1153 (9th Cir. 2001), state
11 petitioners whose convictions were final before April 24, 1996, had until April 24, 1997,
12 to file a federal habeas petition, *Malcom*, 281 F.3d at 955.

13 While Petitioner asserts that he filed a petition for direct review in the California
14 Supreme Court and that the court denied review, he provides neither a case number
15 assigned by that court nor a date on which his petition for review was denied. (Dkt. No.
16 1 at 3). Additionally, the California Supreme Court’s official records indicate that
17 Petitioner never sought direct review of his conviction or sentence with that court.² *See*
18 <http://appellatecases.courtinfo.ca.gov/index.html>, (last visited April 25, 2016).
19 Accordingly, Petitioner’s conviction became final after the period for seeking direct
20 review from the California Supreme Court expired. *See Gonzalez v. Thaler*, 132 S. Ct.
21 641, 653–54 (2012). Therefore, the Court finds that Petitioner’s conviction became final
22 on June 20, 1994, sixty days after the date on which the California Court of Appeal
23 affirmed his conviction on direct review. *See* Cal. R. Ct. 8.308(a) (notice of appeal must
24 be filed “within sixty days after the rendition of the judgment or the making of the order
25 being appealed”).

26 As presented, the facts of the Petition do not demonstrate that “a subsection of

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28 ² The Court takes judicial notice of the California Supreme Court’s official records,
pursuant to *Porter v. Ollison*, 620 F.3d 952, 955 n.1 (9th Cir. 2010) (citations omitted).

1 Section 2244(d) calls for a later initiation of the limitations period.” *Hasan*, 254 F.3d at
 2 1153. Accordingly, Petitioner’s period for seeking review expired on April 24, 1997.
 3 *Malcom*, 281 F.3d at 955. Therefore, the Petition is untimely, absent a showing that
 4 Petitioner is entitled to a later start date of the limitations period, or to statutory or
 5 equitable tolling.

6 **2. STATUTORY TOLLING**

7 Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly
 8 filed application for state post-conviction or other collateral review with respect to the
 9 pertinent judgment or claim is pending shall not be counted toward any period of
 10 limitation under this subsection.” However, a petitioner is not entitled to statutory
 11 tolling if he filed his initial state habeas petition after the one-year federal limitations
 12 period had expired. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (holding
 13 that 28 U.S.C. § 2244(d) “does not permit the reinitiation of the limitations period that
 14 has ended before the state petition was filed”).

15 Here, the period during which Petitioner was permitted to file a timely federal
 16 habeas petition expired on April 24, 1997. *See Malcom*, 281 F.3d at 955. However, the
 17 Petition seemingly indicates that Petitioner did not initiate any state habeas proceedings
 18 until sometime in 2012, at the earliest. (Dkt. No. 1 at 30). A review of official
 19 California court records confirms that Petitioner did not file any state habeas petitions
 20 until 2012. *See* <http://appellatecases.courtinfo.ca.gov/index.html> (last visited April 25,
 21 2016). Because § 2244(d) “does not permit the reinitiation of the limitations period,”
 22 Petitioner is not entitled to statutory tolling in this case. *See Ferguson*, 321 F.3d at 823.

23 **3. EQUITABLE TOLLING**

24 The AEDPA limitations period may also be subject to equitable tolling if the
 25 petitioner shows that extraordinary circumstances beyond the petitioner’s control made
 26 timely filing of a federal habeas petition impossible, and the petitioner has acted
 27 diligently in pursuing his rights. *Holland v. Florida*, 560 U.S. 631, 649 (2010). The
 28 petitioner bears the burden of showing that equitable tolling is appropriate. *Miranda v.*

1 *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

2 Petitioner has made no showing of extraordinary circumstances or of diligence
3 and, therefore, has not demonstrated that he is entitled to equitable tolling.

4 **4. ORDER TO SHOW CAUSE**

5 Under the allegations and facts of the Petition, Petitioner has not demonstrated
6 that he is entitled to a later start date of the limitations period. Therefore, and because
7 the Petition does not demonstrate any basis for tolling the statute, or for setting aside the
8 one-year limitation, the Court orders Petitioner to show cause in writing within 30 days
9 of the date of this order why the Petition should not be dismissed as time-barred. If
10 Petitioner fails to provide a timely response to this order, the Court will recommend that
11 the Petition be dismissed as time-barred.

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13 IT IS SO ORDERED.

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15 Dated: April 27, 2016

16 /S/FREDERICK F. MUMM
17 FREDERICK F. MUMM
18 UNITED STATES MAGISTRATE JUDGE
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